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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERROLL WINBUSH, Defendant and Appellant.	B164949 (Los Angeles County Super. Ct. No. TA066912)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry E. Johnson, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Erroll Winbush of burglary. He was sentenced to a three-year state prison term. On appeal from the judgment, he complains of evidentiary and instructional error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On the morning of October 15, 2002, Alfreda Moore left her house to go to work. Her next door neighbor, James McNeal, came home later that morning. McNeal saw Winbush (appellant) sitting on Moore's front porch. McNeal had never before seen appellant. McNeal left with a friend and returned about an hour and a half later. He saw appellant emerging from the side door of Moore's garage with various items. Appellant put the items behind the garage. McNeal telephoned police.

Los Angeles Police Officers Hajduk and Solano responded to the call. McNeal directed them to the back of Moore's house. The officers saw appellant and George Willis in the alley behind the house. Appellant was standing five feet from several items, including an ice chest, umbrella, shelving, tent, and a hotplate. McNeal identified appellant as the man he saw carrying items from Moore's garage. The officers found a backpack and numerous tools. Officer Hajduk testified he could not recall where the tools were discovered or to whom they belonged.

Moore returned home and identified the recovered items as having been taken from her garage. The side garage door had been locked when she left that morning. The front garage door had an unfastened padlock on it. The padlock was still hanging on the front door, but the side door was now unlocked.

Defense Evidence

Appellant testified in his own defense. He admitted having suffered a robbery conviction in 1986. On the morning of October 15, 2002, appellant and George Willis were behind Moore's house to scrape metal for recycling off a camper shell they had left

in the alley the day before. Appellant had various tools with him for that purpose. He used a hammer to dismantle the camper shell. A woman complained about the noise. Appellant testified the woman lived with McNeal. Appellant claimed he had previously talked with McNeal but he did not know him. Appellant stopped hammering and began prying the metal off the camper shell. Shortly thereafter, McNeal confronted appellant and they talked. Appellant then walked around to McNeal's house. McNeal drove up with a friend. Appellant approached and spoke with the friend.

Appellant returned to the alley where Willis was still working. Appellant went to his truck and began loading scrap metal into it. Two officers arrived and questioned him and Willis. Appellant was arrested. He denied entering Moore's garage and removing the items found by police in the alley.

Officer Hadjuk testified all of the recovered items were either in or leaning up against the ice chest. He could not recall where the backpack and tools were found. They were not inside the ice chest. The officer did not see a camper shell in the alley.

Detective Owens testified he interviewed appellant after obtaining a *Miranda* waiver.[1] Appellant told him he was in the alley with Willis to remove metal from a camper shell. The alley was littered with abandoned items. He did not notice the ice chest or the other items until the officers arrived. Appellant denied being involved in a burglary. He never told Owens he knew of McNeal or had talked to him the day of the burglary.

DISCUSSION

Evidentiary Rulings

Appellant assails two evidentiary rulings by the trial court, sustaining the prosecutor's objections to defense counsel's questioning during trial. We address each of appellant's claims in turn.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

1. McNeal's Alleged Threat to Telephone Police

During direct examination, appellant testified he stopped hammering the camper shell after a woman complained about the noise. About ten minutes later, appellant was confronted by McNeal, and then he walked to McNeal's house. Defense counsel asked appellant why he went to McNeal's house. Appellant answered: "Because he had threatened to call the police." The prosecutor objected on hearsay grounds. The court sustained the objection. At a side-bar conference, counsel argued the statement was admissible for the non-hearsay purpose of establishing appellant's state of mind as a result of what he had heard.[2] The prosecutor made a relevance objection. The court properly sustained the objection because the fact appellant went to McNeal's house and his reasons for doing so, had no bearing on whether appellant committed the burglary.[3]

Appellant now argues the alleged threat was relevant to show McNeal was upset with him, and thus had a motive to fabricate. Under this new theory, the statement would amount to non-hearsay circumstantial evidence of McNeal's state of mind.[4] However, because appellant did not tender the statement for this purpose at trial, he has waived this claim of evidentiary error on appeal.[5]

2. Officer Hajduk's Observations of the Garage Door

McNeal testified he saw appellant carrying items out of the side garage door. On direct examination, Officer Hajduk was not questioned about the point of entry for the burglary. On cross-examination, Officer Hajduk testified the point of entry was the side

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[2] See *People v. Marsh* (1962) 58 Cal.2d 732, 737-740 [out of court statement admitted only to show its effect on the mental state of the listener is not hearsay].

[3] See Evidence Code sections 210, 350.

[4] See *People v. Cox* (2003) 30 Cal.4th 916, 962 [out of court statement offered not for its truth but as circumstantial evidence of the declarant's state of mind is not hearsay and is admissible if the declarant's state of mind is relevant].

[5] Evidence Code section 354; *People v. Hines* (1997) 15 Cal.4th 997, 1034, footnote 4; *People v. Fauber* (1992) 2 Cal.4th 792, 854; *People v. Livaditis* (1992) 2 Cal.4th 759, 778.

garage door. Defense counsel questioned the officer about the basis for his conclusion and the prosecutor interposed a relevance objection. The court sustained the objection without allowing defense counsel to make an offer of proof or argument at side-bar.

Appellant argues the ruling was erroneous. "Through the testimony of Officer Hajduk, appellant could have demonstrated that [Officer] Hajduk was relying upon McNeal's statements rather than conducting his own investigation. This impermissible limitation added credibility to McNeal's testimony."

The trial court properly sustained the objection. Whether the officer was testifying based on his personal observations or those of McNeal relates to his believability. Such evidence, which either shores up or undermines a witness's credibility, is generally relevant.[6] Here, however, the evidence was undisputed the garage was burglarized and the point of entry was the side door. Thus, it made no difference whether or not Officer Hajduk relied exclusively on McNeil's statements to determine the point of entry. Indeed, apart from his conclusory assertion, appellant does not show how the officer's reliance on McNeal's observations would have affected the trial outcome.

In any event, there is no possibility the trial court's evidentiary ruling is prejudicial, whether harmless error is judged under the state standard for erroneous evidentiary rulings, which we believe applicable here,[7] or as appellant urges, the elevated standard, which would be required if the ruling had completely prevented him from establishing a defense.[8] The only issue in this case was the credibility of appellant's identity as the burglar, which was fully explored at trial.

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[6] Evidence Code section 780, subdivision (d).

[7] *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Watson* (1956) 46 Cal.2d 818, 836.

[8] *Crane v. Kentucky* (1986) 476 U.S. 683, 691; *Chapman v. California* (1967) 386 U.S. 18, 24.

CALJIC No. 2.62

Appellant contends the trial court improperly instructed the jury with CALJIC No. 2.62.[9] He further maintains the instruction violated his constitutional rights of due process and a fair trial. Appellant's reasoning, as it was at trial, is the instruction is not supported by the evidence because he never failed to explain or deny any factual matters. The trial court disagreed, concluding appellant failed to explain how the stolen items ended up in the alley. According to appellant, he could not have provided this explanation because, as he testified, he did not notice the items until police detained him. Appellant appears to claim the aspersions cast upon his credibility by the giving of the unwarranted instruction prejudiced him because the jury was led to believe McNeal over him.

We agree with appellant in part. He consistently testified he first noticed the stolen items following his arrest. Respondent argues the jury could have found this assertion implausible because appellant was found within five feet of the items and had been in the alley 45 minutes before the officers arrived. Respondent ignores the principal thrust of appellant's testimony, which is he was unaware of the items because they meant nothing to him. He did not steal them from the garage. Rather, according to appellant, he was busy salvaging scrap metal as he usually did, paying no attention to any of the objects littering the alley and how they ended up there.

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[9] CALJIC No. 2.62 was given as follows: "In this case defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution, which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. [¶] The failure of defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

The question, then, is whether the error requires reversal. "While the court erred in giving CALJIC No. 2.62, such error alone does not mandate reversal. Only if a reviewing court, after examining all the evidence, determines that it is reasonably probable that the trial court would have found in favor of the appealing party but for the error, should the judgment be reversed. [Citation.]"[10] As previously noted, this case boiled down to a credibility contest between appellant and McNeal. In arguing prejudice, appellant seems to assert the jury would have believed him rather than McNeal, but for this instruction. We are not persuaded.

CALJIC No. 2.62 is conditional and self limiting. It does not require the jury to draw unfavorable inferences against a testifying defendant. Instead, the instruction states it applies only if the jury finds the defendant failed to explain or deny unfavorable evidence. Even then, that failure alone does not justify a finding of guilt, nor does it relieve the prosecution from carrying its burden of proof. Finally, the instruction cautions it is inapplicable if the defendant does not possess the requisite knowledge to confirm or deny the unfavorable evidence.[11] The jury was directed to disregard instructions applicable to the facts which the jury determined not to exist.[12] We assume the jury followed these instructions; there is no indication to the contrary.[13] We conclude, accordingly, the instructional error was harmless.

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[10] *People v. De Larco* (1983) 142 Cal.App.3d 294, 309.

[11] *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.)

[12] CALJIC No. 17.31.

[13] The jury's request for a read-back of appellant's testimony merely shows it was properly assessing his credibility.

DISPOSITION

The judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.